

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOYCE B. BEASLEY)	DOCKET NUMBER
)	DC04328310133
)	
v.)	
)	
DEPARTMENT OF THE AIR FORCE)	Date: <u>11 1 DEC 1984</u>

OPINION AND ORDER

Joyce B. Beasley (appellant) was removed from her position as a Secretary (Typing) with the Department of the Air Force, Ramstein Air Force Base, Germany (agency), based on her alleged unacceptable performance in the critical element of "Typing". She appealed to the Board's Washington, D.C. Regional Office. Following a hearing, the presiding official issued an initial decision affirming the agency action. In so doing, he rejected appellant's allegation of age discrimination.

Appellant, pro se, filed a timely petition for review in which she makes several allegations. First, she alleges that the agency failed to allow her to review FPM Letter 432-1 concerning reduction-in-grade and removal based on unacceptable performance. Next, she alleges that the presiding official misinterpreted the evidence of record. Finally, she contends that the presiding official misinterpreted AFR40-452 concerning the agency's requirement that it not remove her based on acceptable performance without having taken advantage of other actions available such as training, counseling and documentation of same, or reassignment.

The petition for review is GRANTED.

Subsequent to the initial decision in this case the Board issued its decision in Sandland v. General Services Administration, MSPB Docket No. PH04328310205 (October 22, 1984), in which we considered the issue of opportunity to demonstrate acceptable performance. See 5 U.S.C. § 4302(b)(6). We held that in an appeal of an agency's Chapter 43 performance-based removal or demotion action, the agency has the burden of proving by substantial evidence that, before undertaking the action, it had afforded the employee whose performance was unacceptable an opportunity to demonstrate acceptable performance.

We stated that the agency may establish a prima facie case by providing documentary or testimonial evidence showing that the employee was offered a reasonable opportunity to improve. Absent a challenge from the employee, such a minimal initial showing would suffice to meet the agency's burden. In the face of a non-frivolous challenge, the burden rests with the agency to show full compliance with the requirement of Section 4302(b)(6) by substantial evidence.

In the instant case, the agency has failed to meet its burden. Appellant was hired by the agency from a "stopper" list on July 8, 1982. Although her performance standards were discussed orally with her upon her arrival, new and revised performance standards were presented to her on August 25, 1982, over six weeks later. Less than one month later, on September 22, 1982, the agency proposed appellant's removal based on her alleged unacceptable performance. Specific deficiencies in her typing, covering both the periods prior to and after her receiving the performance standards, were cited by the agency in support of its action.

Although the agency claims that it "counselled" appellant, this counseling consisted of its merely reviewing her work product and indicating her errors.^{1/} At no time prior to the notice of proposed removal did the agency inform appellant that her work was unacceptable and offer her a reasonable opportunity to improve as required by the statute. In fact, the record shows that the superintendent of her division, Robert Q. Wilkes, had determined within appellant's first week on duty that appellant's typing and secretarial skills "were not adequate to enable her to perform satisfactorily at the performance levels in her job performance appraisal,"^{2/} even though the performance elements for appellant's position had not yet been finalized and were not presented in writing to appellant until over six weeks later.

Under the circumstances of this case, the agency had determined that appellant was going to fail and appellant could have done nothing to correct the performance her supervisors had continually criticized.^{3/} Therefore, appellant could not demonstrate acceptable performance. As a result,

^{1/} See Deposition of Donald I. Maw, Regional Office File at Tab 3.

^{2/} See Deposition of Robert Q. Wilkes, Regional Office File at Tab 3.

^{3/} In addition to the performance deficiencies continually monitored by the agency, the agency's overbearing manner of supervising this employee is best exemplified by its recording of any misconduct, no matter how inconsequential, beginning from appellant's first week of duty. The agency conduct in this case is especially troublesome since it was aware that appellant was having a great deal of difficulty in becoming acclimated to her new environment, was not having success in obtaining adequate housing and transportation, and had not yet received a top secret clearance, thereby requiring an escort at all times in the agency facility.

we find that the agency has not met its burden of proving by substantial evidence that appellant was afforded a reasonable opportunity to improve. Thus, the agency's Chapter 43 action, lacking proof of a substantive element, cannot be sustained.

Accordingly, the initial decision is REVERSED and the agency action is NOT SUSTAINED. The agency is ORDERED to cancel appellant's removal and to award back pay and benefits in accordance with 5 C.F.R. § 550.805. Proof of compliance with the decision shall be submitted by the agency to the Office of the Clerk of the Board within twenty (20) days of the issuance of this Order. Any petition for enforcement of this Order shall be made to the Washington, D.C. Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

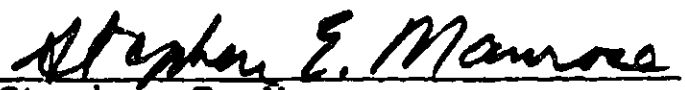
The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in

a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty days after the appellant's receipt of this order.

FOR THE BOARD:


Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.